IN THE

Supreme Court of the United States

October Term,

No. 74-1515

HENRY E. HOWELL, JR.

Appellant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, et al.

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

HENRY E. HOWELL,JR., Appellant,

vs.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, et al., Appellees.

ON APPEAL FROM THE
SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

The appellant, Henry E. Howell, Jr., was and is a subscriber to the services of The Chesapeake and Potomac Telephone Company of Virginia and was an inter-

venor 1/ in the proceedings before the State Corporation Commission of Virginia, and appealed the ruling of that Commission to the Supreme Court of Virginia.

Appellant appeals from the decision of the Supreme Court of Virginia entered March 10, 1975, denying appellant's petition for a rehearing of its opinion dated January 20, 1975, which had affirmed an opinion of the State Corporation Commission of Virginia allowing The Chesapeake and Potomac Telephone Company of Virginia to increase its intrastate rates by $12,636,371.00 per year, and submits this Statement to show that the

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1/ At the time of intervention the appellant was Lieutenant Governor of Virginia.

Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Virginia granting the increase is reported at 215 Va. 549 (1975), _____ S.E.2d _____, (App.3) and the decision denying the Petition For Rehearing is not reported. (App. 1). The majority opinion of the State Corporation Commission of Virginia is reported at 3 P.U.R., 4th 160 (1974) (App.34) and the dissenting opinion is reported at 3 P.U.R., 4th 181 (1974) (App. 129).

JURISDICTION

The Virginia State Corporation Commission, in fixing telephone rates,

acts in its legislative capacity, Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L. Ed. 150 (1908), and the opinion which is the subject of this appeal violates the federal case law governing rate making procedures established by the Supreme Court of the United States in Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L. Ed. 819 (1898), Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352, 33 S.Ct. 729, 57 L. Ed. 1511 (1913), Smith v. Illinois Bell Telephone Co., 282 U.S. 113, 51 S. Ct. 65, 75 L.Ed. 225 (1931) and Louisiana R. R. Comm. v. Cumberland Tel. Co., 212 U.S. 414, 29 S.Ct. 357, 53 L. Ed. 577 (1909).

The opinion of the Supreme Court of Virginia denying a rehearing was entered on March 10, 1975, and Notice Of Appeal

was filed with the Clerk of the Supreme Court of Virginia, which Court's opinion is the subject of this appeal, and with the Clerk of the State Corporation Commission of Virginia, that being the Court or body possessed of the Record at the time of this appeal.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Did the Virginia State Corporation Commission, in exercising its legislative right to fix intrastate telephone rates in Virginia, violate constitutional limitations on rate making jurisdiction established by this Court in Smyth v. Ames, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed.

819 (1898), Simpson v. Shepard, (Minnesota Rate Cases) 230 U.S. 352, 33 S.Ct. 729, 57 L. Ed. 1511 (1913) and Smith v. Illionis Bell Telephone Co., 282 U.S. 113, 51 S.Ct. 65, 75 L. Ed. 225 (1931)?

2. Did the Supreme Court of Virginia violate the law established by this Court in Louisiana R. R. Comm. v. Cumberland Tel. Co., 212 U.S. 414, 29 S.Ct. 357, 53 L. Ed. 577 (1909), when it affirmed the ruling of the Virginia State Corporation which included in the rate base funds and properties contributed by rate payers?

CONSTITUTIONAL QUESTIONS INVOLVED

This Court in Simpson v. Shepard, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511 (1913), held that unreasonably low rates deprive a utility of its property without

due process of law and denies the equal protection of the laws. Appellant submits that the rate making formula legislated through the action of the Virginia State Corporation Commission, which included customer contributed funds in the rate base, and computed rate of return on nonjurisdictional business, deprives the rate payer of property without due process of law and denies the equal protection of the laws and just compensation as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. To the extent that customers are overcharged through illegal rate making practices sanctioned by the State, they are denied due process and their property is taken by State action without just compensation because they

receive no additional service in return for the excess rates they are forced to pay.

STATEMENT

On January 9, 1974, the Virginia State Corporation Commission, in the exercise of its legislative power to fix utility rates, allowed The Chesapeake and Potomac Telephone Company of Virginia a $12,636,371.00 annual increase in intra-state rates. In a two-to-one opinion the majority agreed on a rate making formula that accepted the cost of capital to the parent company, American Telephone and Telegraph Company, as the cost of capital to the intrastate business of The Chesapeake and Potomac Telephone Company of Virginia, although The Chesapeake and Potomac Telephone Company of Virginia was

proved to be the most profitable of the 25 companies constituting the Bell System. (S.C.C. Opinion, R. V.I, 38, App. 104) (Arlington Co. Ex. H-8, R.V.IX,3208).

At the conclusion of the case the appellant raised the unconstitutionality of this ruling in a Motion To Dismiss. (R.V.I, 52):

> "*** No independent evaluation of the Virginia intrastate jurisdiction was undertaken by the Company and no evidence was offered on the proper rate of return for the Virginia intrastate jurisdiction based solely on the cost of serving this jurisdiction. The rules of law and statements of principle in Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L. Ed. 819 (1898), Simpson v. Shepard (Minnesota Rate Cases), 230 U.S. 352, 33 S.Ct. 729, 57 L. Ed. 1511 (1913), and Commonwealth v. VEPCO, 211 Va. 758, 190 S.E. 2d 685 (1971) require that this Commission base its finding of a proper rate of return solely upon the cost of serving the Virginia intrastate

> jurisdiction without regard to the cost of serving the other jurisdictions served by Chesapeake and Potomac Telephone Company or A. T. & T. Evidence purporting to base a proper rate of return on the cost of capital must be directed exclusively to the cost of capital for the Virginia intrastate jurisdiction if this Commission is to have competent evidence upon which to determine a proper rate of return. The Company has not done this and has not offered any other evidence in support of its claim that its current earnings do not constitute a fair return on its investment in the Virginia intrastate jurisdiction."

The motion was denied by the Virginia State Corporation Commission. (R. V. I, 8).

Appellant assigned as error the denial of this Motion. (R.V.I, 56).

The second point raised by this appeal is the ruling of the majority of the State Corporation Commission that a rate of return should be allowed to

investors on a rate base that included funds contributed from non-investor sources, e.g., unamortized investment tax credits and deposits required from rate payers as a prerequisite to service.[2] Commissioner Bradshaw agreed with appellant that customer deposits should not be included in the rate base.[3]

Appellant contended that the inclusion of customer contributed funds in

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2/ There were also other customer contributed capital sources included in the rate base: deferred taxes, accelerated depreciation and unmatured interest.

3/ Commissioner Bradshaw dissented from that portion of the majority opinion that included customer deposits in the rate base. (R.V.I,49, App. 130).

the rate base violated the rate making mandate of this Court in Louisiana R.R. Comm. v. Cumberland Tel.Co., 212 U.S. 414, 29 S. Ct. 357, 53 L. Ed. 577 (1909). At 212 U.S. 424, this Court stated:

> "*** It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was operating, and so to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders.***"

This issue was raised during the course of the hearing and in appellant's Motion To Dismiss made at the conclusion of the hearing. (R.V.I,51) and in

Assignment of Error 2. (R.V.I.,56).

The Virginia State Corporation Commission denied appellant's Motion without assigning reason therefor, (R. V. I, 25,26, App.73-77) although appellant specifically cited the authority of this Court in Louisiana R.R. Comm. v. Cumberland Tel. Co., 212 U.S. 414, 29 S. Ct. 357, 53 L. Ed. 577 (1909), to support the exclusion of non-investor capital from the rate base.

The Supreme Court of Virginia affirmed the Virginia State Corporation Commission, without citing or distinguishing this Court's controlling opinions.

215 Va. 543,____ S.E.2d_____(1975) (App. 3).[4/]

4/ Appellant's brief to the Supreme Court of Virginia cited this Court's opinions in Smyth v. Ames, 169 U.S.466,18 S.Ct.418, 42 L.Ed. 819 (1898),Simpson v. Shepard, 230 U.S.352,33 S.Ct.729,57 L.Ed. 1511 (1913),Louisiana R.R.Comm.v. Cumberland Tel.Co.,212 U.S.414, 29 S.Ct.357,53 L.Ed.577 (1909) and Smith v. Illinois Bell Tel. Co.,282 U.S.113,51 S.Ct. 65, 75 L. Ed. 225 (1931),and the Supreme Court of Virginia ignored the citations in its opinion. In his Petition For Rehearing, the appellant cited the Virginia Court's refusal to rule on the applicability of this Court's opinions and the participation of the Justice who had previously sat on the Board of Directors of The Chesapeake and Potomac Telephone Company of Virginia. Minimal requirements of constitutional due process guarantee a fair hearing. See Railroad Comm. of California, et al v. Pacific Gas & Electric Co., 302 U.S. 388, 393, 58 S.Ct. 334,338,82 L.Ed.319. (1938).

From the Supreme Court of Virginia's affirmance of the Virginia State Corporation Commission's unconstitutional rate making formula appellant seasonably noted this appeal.

THE QUESTIONS ARE SUBSTANTIAL

It is of national importance that State Commissions charged with the legislative responsibility of fixing utility rates be required to comply with the mandate laid down by this Court in Smyth v. Ames, 169 U.S.466, 18 S.Ct. 418, 42 L.Ed.819 (1898) and the cases that follow. At page 541 of 169 U.S., this Court held:

> "*** In our judgment it must be held that the reasonableness or unreasonableness of rates prescribed by a state for the transportation of persons and

property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the State has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the State that the State can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety; that its income goes into, and its expenses are

> provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business." (Emphasis Added.)

The fact that The Chesapeake and Potomac Telephone Company of Virginia is a wholly owned subsidiary of the American Telephone and Telegraph Company could not justify the Virginia State Corporation Commission avoiding the law established in Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898), by accepting the cost of capital to American Telephone and Telegraph Company as the cost of capital to the Virginia intrastate jurisdictional customers of The Chesapeake and Potomac Telephone Company of Virginia.

The Bell system is made up of profitable and not so profitable companies operating in 48 states. The use by the Virginia State Corporation Commission of a consolidated capital structure imposed the following unconstitutional result, as described in the uncontradicted testimony of Dr. Michael Ileo, the Commission's cost of money expert (R.V.7,2673):

> "Q. When we take an allocated portion of the consolidated debt structure, any omissions, anything that has been designed by the holding company for the health and welfare of the holding company and which is detrimental to C&P of Virginia an allocable portion of that detriment accrues to Virginia rate payers, is that correct?
>
> A. Yes."

The adverse effect on the Virginia intrastate rate payer of having to pay rates based upon a consolidated cost of

capital to the entire Bell System is established by Arlington County Exhibit H-8 (R.V.IX,3208), which demonstrated a ratio of net operating income to average net book cost of all Bell Companies. Chesapeake and Potomac Telephone Company of Virginia had the highest at 8.48%, and Ohio Bell Telephone had the lowest at 5.67%.

Lower earnings imply greater risk to investors who respond by demanding a higher rate of return. By having the rate of return they must pay determined by an evaluation of the risks and return needed by the entire Bell System, intrastate customers of The Chesapeake and Potomac Telephone Company of Virginia, which constitute only about 2% of the Bell System, were required to subsidize

the less profitable operations in other Bell companies contrary to the Court's mandate in Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L. Ed. 819 (1898).

Unconstitutional rates also resulted from the action of the majority of the members of the Virginia State Corporation Commission when they included in the rate base, which became entitled to a 8.65% rate of return, customer deposits which earned only 6%, as well as other customer contributed capital, which was cost free to Chesapeake and Potomac Telephone Company of Virginia.

As noted, supra, this Court ruled in 1909 in Louisiana R.R.Comm. v. Cumberland Tel. Co., 212 U.S. 414, 29 S. Ct. 357, 53 L. Ed. 577, that no utility can take funds which customers have

contributed for the payment of expenses and use such funds to purchase additional property which is then added to the capital investment to increase the amount or base upon which the company is entitled to earn a return.

The constitutional questions set forth in this appeal have nationwide importance. Through extensive research, appellant has found that use of company-wide cost of capital to set jurisdictional rates is widespread among the Federal and State regulatory commissions. Many commissions also include one or more categories of customer contributed capital in the rate base upon which a rate of return is allowed to investors.

Revenues of telephone, gas and electric utilities totalled $70 billion

in 1973. The excessive rates which result from the unconstitutional practices noted in this appeal are a great burden on utility customers struggling against inflation and recession.

Appellant submits the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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PROOF OF SERVICE

I, Henry E. Howell, Jr., an attorney duly qualified before the Supreme Court of the United States and representing myself as appellant herein, hereby certify that on the 30th day of May, 1975, I served copies of the foregoing Jurisdictional Statement on the several parties hereto, and that they are the only persons upon whom service is required to be made, as follows:

1. On The Chesapeake and Potomac Telephone Company of Virginia, by depositing three copies in a United States Mail Box in a duly addressed envelope, with first class postage pre-paid, to Joseph E. Blackburn, Esquire, c/o The Chesapeake and Potomac Telephone

Companies, 1710 H Street, N.W., Washington, D. C. 20006, its counsel of record in the proceedings before the Supreme Court of Virginia and the State Corporation Commission of Virginia, and by depositing three copies in a United States Mail Box in a duly addressed envelope, with first class postage pre-paid, to A. W. Whittaker, Esquire, c/o The Chesapeake and Potomac Telephone Company of Virginia, 703 E. Grace Street, Richmond, Virginia, 23219.

2. On The State Corporation Commission of Virginia, by depositing three copies in a United States Mail Box in a duly addressed envelope, with first class postage prepaid, to Richard D. Rogers, Jr., Esquire, c/o State Corporation Commission, Blanton Building

Richmond, Virginia, 23219, its counsel of record in the proceedings before the Supreme Court of Virginia and the State Corporation Commission of Virginia, and by depositing three copies in a United States Mail Box in a duly addressed envelope, with first class postage pre-paid, to Honorable Andrew P. Miller, Attorney General of Virginia, Supreme Court Building, Richmond, Virginia, 23219.

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